In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–126

BOYER BROTHERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board held that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act by engaging in a pattern of unlawful conduct designed to undermine its employees' support of Bakery and Confectionery Workers' International Union, and by refusing to recognize and bargain with the Union. The Board ordered petitioner to bargain with the Union, finding that the latter had obtained valid authorization cards from a majority of the unit employees and that, in view of petitioner's "substantial and pervasive" unfair labor practices, these cards provided a more reliable measure of employee representation sentiment than would be an election (Pet. App. 82–86a).

2. Petitioner's contention relates to the solicitation of the cards of two employees, Rinker and Reeseman. After the close of the hearing before the Trial Examiner, petitioner moved the Board to reopen the record to take evidence concerning these cards on the ground that they were solicited by Betty Henry, a supervisor. The Board denied the motion (Pet. App. 22a). The reasoning of the Board was explained in its subsequent Supplemental Decision (Pet. App. 83a–84a, n. 2). It assumed that supervisory solicitation had occurred but concluded that, in the circumstances of this case, it could not have affected the validity of the cards solicited (Pet. App. 84a, n. 2).[1] The court below rejected the Board's reasons for finding supervisory solicitation to be immaterial, if it occurred. But it held that the Board's refusal to reopen the record with respect to Reeseman's card was not an abuse of discretion, since the matters concerning Henry's alleged solicitation set forth in Reeseman's post-hearing affidavit were known to her at the time of the hearing and there was no excuse for counsel's failure to elicit testimony thereon at the hearing (Pet. App. 16a–17a).[2] The court accordingly counted Reeseman's card, which gave the Union a one-card ma-

[1] The Board relied, *inter alia*, on the fact that Henry was represented by the company not to be a supervisor, and that she was ultimately discharged for demonstrating her support for the Union.

[2] The court added that "Reeseman's testimony at the hearing was extremely weak, culminating in her admission that not all of the contents of an affidavit previously sworn to by her was true" (Pet. App. 17a, n. 11).

jority,[3] and enforced the Board's bargaining order (Pet. App. 18a).

3. The question raised in the petition (pp. 3, 7)—whether a reviewing court may properly set aside a finding of the Board to which no exception was taken—is not presented here. As the court of appeals noted (Pet. App. 14a), the issue of supervisory solicitation of authorization cards was raised before the Board by petitioner's motion to reopen the record, and the Board, after consideration, denied the motion. The court of appeals, in finding that Reeseman's card was not tainted by supervisory solicitation, thus did not pass on an issue which had not previously been presented to the Board, but merely sustained the Board's action on different grounds. The cases cited by petitioner (Pet. 8–9) are inapposite, for there, unlike here, the issue had not been raised before the agency.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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PETER G. NASH,
General Counsel,
National Labor Relations Board.

AUGUST 1972.

[3] The court invalidated the card of Rinker. It found that the evidence of supervisory solicitation in her post-hearing affidavit was newly discovered, since she had been unable to appear and testify at the hearing due to serious illness.

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